Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1777

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC., PETITIONER

v.

JOSIAH WEDGWOOD & SONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

LAWRENCE G. WALLACE
Acting Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

ROBERT B. NICHOLSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a plaintiff who has suffered repeated unlawful refusals to deal is barred by the four-year statute of limitations from obtaining relief from any refusal because he has not brought suit within four years of the initial refusal, notwithstanding the fact that the subsequent refusals for which relief is sought occurred less than four years prior to suit.

TABLE OF CONTENTS

Page

Statement 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Ansul Co. v. *Uniroyal, Inc.*, 306 F. Supp. 541, aff'd in part and rev'd in part on other grounds, 448 F. 2d 872, cert. denied, 404 U.S. 1018 4

Board of Regents v. *Tomanio*, 446 U.S. 478 6

Borger v. *Yamaha Int'l Corp.*, 625 F. 2d 390 4

Chapa v. *Volkswagen of America, Inc.*, [1974-1] Trade Cas. para. 74,911 4

Charlotte Telecasters, Inc. v. *Jefferson-Pilot Corp.*, 546 F. 2d 570 3

Garelick v. *Goerlich's Inc.*, 323 F. 2d 854 4

Imperial Point Colonnades Condominium, Inc. v. *Mangurian*, 549 F. 2d 1029, cert. denied, 434 U.S. 859 ..... 3, 6

Manok v. *Southeast District Bowling Ass'n*, 306 F. Supp. 1215 4

Multidistrict Vehicle Air Pollution, In re, 591 F. 2d 68, cert. denied, 444 U.S. 900 ..... 3, 4

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 6

Page

Cases—Continued:

Pioneer Co. v. *Talon, Inc.*, 462 F. 2d 1106 3

Poster Exchange, Inc. v. *National Screen Service Corp.*, 517 F. 2d 117 ..... 3, 4

Southeastern Hose, Inc. v. *Imperial-Eastman Corp.*, [1973-1] Trade Cas. para. 74,479 4

United States v. *Kubrick*, 444 U.S. 111 6

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 ..... 2, 3

Statutes:

Clayton Act, Section 4B, 15 U.S.C. 15b 2

Sherman Act, Section 1, 15 U.S.C. 1 2

Miscellaneous:

II P. Areeda & D. Turner, *Antitrust Law* (1978) 3, 4, 5

H.R. Rep. No. 422, 84th Cong., 1st Sess. (1955) 5

S. Rep. No. 619, 84th Cong., 1st Sess. (1955) 5

13 J. von Kalinowski, *Antitrust Laws and Trade Regulation* (1980) 5

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1777

DAVID ORGELL, INC., PETITIONER

v.

JOSIAH WEDGWOOD & SONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner David Orgell, Inc. ("Orgell"), is a retailer of silver, china and crystal in the Los Angeles area. Respondent Josiah Wedgwood & Sons, Inc. ("Wedgwood"), manufactures china and dinnerware and sells its products to various retailers in the Los Angeles area, including Geary's Stores, Inc. ("Geary's"), one of Orgell's competitors (Pet. App. 1a).

In 1965, Orgell sought and was refused the opportunity to retail Wedgwood products. In 1968 and on two occasions between 1976 and 1978, Orgell again sought and was refused access to the Wedgwood line (Pet. App. 2a).

In 1978, Orgell sued Wedgwood, Geary's, and other china and dinnerware manufacturers, alleging that they had conspired to refuse to deal with Orgell, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court granted summary judgment to Wedgwood on the ground that the suit was barred by the four-year statute of limitations applicable to private antitrust suits under Section 4B of the Clayton Act, 15 U.S.C. 15b, notwithstanding the fact that Wedgwood had refused to deal with Orgell within the four years preceding the suit (Pet. App. 5a-7a). The court of appeals affirmed (Pet. App. 1a-3a), holding that the cause of action accrued with the first refusal to deal in 1965 and that each subsequent refusal was only " 'a reaffirmation of the original decision not to deal with the plaintiff' " (*id.* at 3a).

ARGUMENT

The court of appeals' decision that repeated unlawful refusals to deal do not give rise to new causes of action exacerbates a conflict among the circuits. Moreover, the decision poses needless risks for antitrust enforcement without advancing the policies that underlie the statute of limitations. Accordingly, we submit that review by this Court is warranted.[1]

1. Section 4B of the Clayton Act, 15 U.S.C. 15b, provides that private antitrust claims "shall be forever barred unless commenced within four years after the cause of action accrued." As this Court observed in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), in the context of an ongoing conspiracy to violate the antitrust laws, Section 4B has usually been construed to mean that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the

---

[1] Like the court of appeals and the district court, we express no view as to the merits of Orgell's substantive claim.

damages caused by that act and * * *, as to those damages, the statute of limitations runs from the commission of the act."

The courts of appeals have split on the issue of applying the statute of limitations to suits for repeated refusals to deal. The Fourth, Fifth and Eighth Circuits have held that repeated refusals to deal give rise to new causes of action and thereby allow plaintiffs to bring suit within four years of the most recent refusal. *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F. 2d 570, 572 (4th Cir. 1976); *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F. 2d 117, 123-128 (5th Cir. 1975); *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F. 2d 1029 (5th Cir.), cert. denied, 434 U.S. 859 (1977) (elaborating on *Poster Exchange*); *Pioneer Co.* v. *Talon, Inc.*, 462 F. 2d 1106 (8th Cir. 1972).[2] These courts qualify the general rule with two narrow caveats, both of which are implicit in this Court's decision in *Zenith*: (1) the initial refusal to deal must not have been irrevocable; and (2) the plaintiff actually must have been denied an opportunity to deal within the four-year period. See, *e.g.*, *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra*, 549 F. 2d at 1035. See also *In re Multidistrict Vehicle Air Pollution*, 591 F. 2d 68, 72 (9th Cir.), cert. denied, 444 U.S. 900 (1979). The

---

[2]Although Wedgwood suggests (Br. in Opp. 6) that *Poster Exchange* is confined to monopolization suits, the Fifth Circuit has not so limited it. See *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra*, 549 F. 2d at 1034-1035. See also II P. Areeda & D. Turner, *Antitrust Law*, para. 325b, at 122 n.19 (1978).

Wedgwood's attempt (Br. in Opp. 7-8) to distinguish *Pioneer* on the ground that no harm accrued to Pioneer from the initial notice of termination, leaving the first refusal to accept an order (which occurred within the limitations period) as the source of harm, neglects the case's far broader holding: "[I]t is quite clear that [Talon's] continued refusals to deal caused new injury to Pioneer *each time an order was refused*." 462 F. 2d at 1109 (emphasis added; footnote omitted).

courts have stressed that the irrevocable-refusal exception is extremely limited in scope. If the circumstances surrounding the initial refusal to deal make the decision irrevocable or the harm it causes irretrievable, subsequent refusals do not cause new harm, since the initial choice compelled all the harm that followed. See *In re Multidistrict Vehicle Air Pollution, supra,* 591 F. 2d at 72; *Poster Exchange, Inc.* v. *National Screen Service Corp., supra,* 517 F. 2d at 126. Otherwise, a mere refusal to deal, however emphatic, is not deemed to be final or irrevocable; as long as the decision is capable of being reversed, each subsequent refusal to deal inflicts new harm on the plaintiff.

There is, however, a conflicting line of authority. The Sixth Circuit has held that subsequent refusals to deal do not give rise to new causes of action, on the ground that even if the refusals qualify as "overt acts," they do not themselves cause new harm. *Garelick* v. *Goerlich's, Inc.,* 323 F. 2d 854, 856 (6th Cir. 1963) ("[T]he [subsequent] incidents were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants"). *Garelick* has found support in several district courts, including the Southern District of New York. See *Chapa* v. *Volkswagen of America, Inc.,* [1974-1] Trade Cas. para. 74,911 (D.D.C. 1974); *Southeastern Hose, Inc.* v. *Imperial-Eastman Corp.,* [1973-1] Trade Cas. para. 74,479 (N.D. Ga. 1973); *Manok* v. *Southeast District Bowling Ass'n,* 306 F. Supp. 1215, 1221 (C.D. Cal. 1969); *Ansul Co.* v. *Uniroyal, Inc.,* 306 F. Supp. 541, 569 (S.D.N.Y. 1969), aff'd in part and rev'd in part on other grounds, 448 F. 2d 872 (2d Cir. 1971), cert. denied, 404 U.S. 1018 (1972).[3] Commentators also have treated *Garelick* as stating the general rule. See II P. Areeda & D. Turner,

---

[3]But see *Borger* v. *Yamaha Int'l Corp.,* 625 F. 2d 390, 398 (2d Cir. 1980) (dictum).

Antitrust Law, para. 325b, at 121 (1978); cf. 13 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 103.02[1][a] (1980).

The decision below aligns the Ninth Circuit with the Sixth Circuit on the issue. Although the court below purported to rest its ruling on the irrevocable-refusal exception employed by the Fourth, Fifth and Eighth Circuits, it has expanded the exception so widely as to swallow the rule. Rather than focusing on the irreversibility of the refusal to deal, the court of appeals based its decision upon the "unequivocal" nature of the initial refusal (Pet. App. 3a). On this rationale, no suit for repeated refusals to deal could ever be brought more than four years after the initial refusal, since every subsequent refusal would qualify as a "reaffirmation" of the original decision.

2. The statute of limitations for repeated refusals to deal now varies from circuit to circuit; how quickly a plaintiff must sue depends on the fortuity of where he brings suit. This division among the courts of appeals perpetuates the very "confusion and discrimination" that Congress sought to avoid by adopting a uniform federal statute of limitations for the antitrust laws in 1955. S. Rep. No. 619, 84th Cong., 1st Sess. 5 (1955); H.R. Rep. No. 422, 84th Cong., 1st Sess. 7 (1955). This Court should grant review to restore uniformity among the circuits.

We think, moreover, that the Court should resolve the conflict by reversing the decision below and approving the rule followed by the Fourth, Fifth and Eighth Circuits. Provided that the original refusal is not "irrevocable" within the narrow meaning of that term (see page 4, *supra*), where there are repeated unlawful refusals to deal each subsequent unlawful refusal is the cause of whatever harm follows it, because that harm would have been forgone but for the new unlawful refusal. The contrary position of the

court below rests on the erroneous premise that subsequent decisions whether or not to deal have no effect.

The decision below is not justified by any of the policies underlying the statute of limitations. Statutes of limitations safeguard judicial accuracy, preserve settled expectations, insure timely notice of claims, and generally "promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). Barring suits for repeated refusals to deal advances none of these goals, since, in order to maintain a cause of action under the statute, the plaintiff must demonstrate that it has been refused an opportunity to deal within the four-year period. See *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra*, 549 F. 2d at 1041. Nor is the Ninth Circuit's interpretation of the statute of limitations needed as an incentive to bring suit quickly, since it is always in a plaintiff's interest to seek relief as quickly as possible. See *id.* at 1044.[4]

Moreover, the Ninth Circuit's rule is particularly undesirable in refusal to deal cases. A merchant who hopes eventually to obtain a supplier's products may well be less likely to bring suit immediately and jeopardize a potentially profitable future business relationship than to wait and make another request to carry the goods. The Ninth Circuit's rule will force buyers to choose between bringing what

---

[4]Even if a rule barring refusal-to-deal suits brought more than four years after an initial refusal to deal otherwise would serve a prophylactic function, those plaintiffs most likely to bring suit more than four years after an initial refusal to deal are the ones most likely to lack alert antitrust counsel and, hence, least likely to become aware of a prophylactic rule until the deadline has passed.

may turn out to be a needless and undesired lawsuit and forgoing the protection of the antitrust laws. Forcing such a choice is contrary to the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

ROBERT B. NICHOLSON
Attorney

AUGUST 1981

DOJ-1981-08